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IS THERE A RIGHT TO VIEW THE DEAD AT DOVER?
JB PICTURES v. DEPARTMENT OF DEFENSE: LIMITS
ON THE MEDIA'S RIGHT TO GATHER
INFORMATION

I. INTRODUCTION

An informed society is a necessary ingredient of every democracy.¹ Realizing this, the framers of the Constitution drafted the First Amendment which provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."² The press acts as a check on governmental abuse by providing the public with information pertaining to governmental decisions.³ The people can use this information to correct abuses by electing new delegates.⁴ Therefore, governmental restrictions on speech or the

1. See Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 247 (1996). Foster discusses the "informed citizenry theory" of democracy which provides that public information acts as a necessary democratic check on the government. See *id.* This theory recognizes the essential role that information plays in consolidating and stabilizing a democracy. See *id.* Therefore, advocates of this theory hold the media in high esteem for its collection and dissemination functions. See *id.* at 248.

2. U.S. CONST. amend. I.

3. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966). "[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Id.* A free press serves as another branch of government checking the abuses of power by any of the established branches. See William T. Coleman, Jr., *A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections*, 59 TUL. L. REV. 243, 244 (1984).

4. See Coleman, *supra* note 3, at 244. A democracy depends on periodic elections for its survival. See *id.* The press provides the electorate with the information needed to make educated decisions concerning the nation's future leadership. See *id.* Coleman notes numerous other functions of a free press in a democracy including holding governmental institutions accountable to the people and providing a medium for the discussion of crucial public policy issues. See *id.*

press⁵ are a serious concern because such restrictions may allow abuses to go unrecognized and unchanged.⁶

Open access for the press is especially important in times of war when governmental abuses could potentially lead to the loss of life.⁷ Just prior to Operation Desert Storm, the Department of Defense restricted the media's coverage of deceased soldiers at Dover Air Force Base.⁸ In *JB Pictures v. Department of Defense*,⁹ the District of Columbia Circuit Court addressed whether it is constitutional to restrict the media from covering the arrival of deceased soldiers

5. See Melville B. Nimmer, *Introduction - Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653 (1975), *reprinted in*, ERIC BARENDT, *MEDIA LAW* 11, 25 (Eric Barendt ed., 1993) (concluding that it is possible to differentiate between freedom of press and speech based on purposes of each freedom). Free speech serves the following three functions: (1) the ability to hear all views and therefore participate intelligently in a democratic society, (2) self-fulfillment and (3) an alternative to violent acts. *See id.* Freedom of the press, like free speech, enables society to participate intelligently in a democracy, but only provides a limited self-fulfillment function. *See id.* at 26. Although this distinction exists, the Supreme Court treats these freedoms as indistinguishable. *See id.* at 14.

6. *See Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). Justice Sutherland characterized informed public opinion as the most potent restraint on governmental abuses and therefore viewed any restriction on a free press with grave concern. *See id.*

Similarly, Justice Holmes expressed the marketplace of ideas theory which suggests "that the ultimate good . . . is . . . reached by free trade in ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919). This theory recognizes that restraints on speech are not necessary because the marketplace will naturally eliminate expression that the majority disagrees with. *See id.*

7. *See* Michelle D. Boydston, Comment, *Press Censorship and Access Restrictions During the Persian Gulf War: A First Amendment Analysis*, 25 LOY. L.A. L. REV. 1073, 1091 (1992). One of the primary responsibilities of the press is "to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell." *Id.*; *see also* Michelle Tulane Mensore, Note, *The First Amendment Fights Back: A Proposal for the Media to Reclaim the Battlefield After the Persian Gulf War*, 49 WASH. & LEE L. REV. 1145, 1181-82 (1992) (discussing media's conflict with Department of Defense during Persian Gulf War and noting likelihood of detrimental consequences if public remains ignorant because of military deception or restrictions); Michael W. Klein, *The Censor's Red Flair, the Bombs Bursting in Air: The Constitutionality of the Desert Storm Media Restrictions*, 19 HASTINGS CONST. L.Q. 1037, 1075 (1992) (stating "[w]hen the government decides to commit its troops to war, the significance of the press as a source of information intensifies"); Mark C. Rahdert, *The First Amendment and Media Rights During Wartime: Some Thoughts After Operation Desert Storm*, 36 VILL. L. REV. 1513, 1540 (1991) (describing compelling public interest in information during war time in order to maintain democratic control).

8. *See* U.S. DEPT. OF DEFENSE, PUBLIC AFFAIRS GUIDANCE—OPERATION DESERT STORM CASUALTY AND MORTUARY AFFAIRS 3, Joint Appendix ("J.A.") 123 (Feb. 7, 1991). For a specific discussion of the Department of Defense policy, *see infra* notes 20-21 and accompanying text.

9. 86 F.3d 236 (D.C. Cir. 1996).

during or following a war.¹⁰ The government argued that unrestricted press access would infringe on privacy interests of the deceased's family.¹¹ The media countered that restricted coverage would result in a one-sided perception of the war, allowing the public to see the healthy soldiers leaving for war but not those returning in caskets.¹²

This Note examines the holding and rationale provided by the court in *JB Pictures* as well as the implications for the media's access to Dover Air Force Base and other governmentally restricted areas. The first section of this Note details the facts of *JB Pictures*.¹³ Next, this Note provides an overview of the media's right of access in various situations.¹⁴ This Note then explains the D.C. Circuit Court's rationale supporting its holding in *JB Pictures*.¹⁵ The fourth section analyzes the court's reasoning providing a critique based on prior holdings and additional authority.¹⁶ Finally, this Note examines the likely consequences of the court's holding in *JB Pictures*.¹⁷

II. FACTS

Prior to Operation Desert Storm, soldiers killed abroad were brought to Dover Air Force Base (Dover) where they were prepared

10. *Id.* While courts have addressed a right of access issue with respect to military bases, this issue historically arose in the context of freedom of speech rather than the right to gather information. For a discussion of cases dealing with the press's right of access to military bases for freedom of speech purposes, see *infra* notes 123-27 and accompanying text.

11. See *JB Pictures*, 86 F.3d at 241. The government argued that bereaved families may not want media coverage of the arrival of caskets at Dover and that if ceremonies were held at Dover, families and friends would experience a burden by feeling compelled to travel to Dover to attend the ceremonies. See *id.* For a further discussion of these arguments and the D.C. Circuit's analysis of them, see *infra* notes 147-49 and accompanying text.

12. See *JB Pictures*, 86 F.3d at 241. *JB Pictures* and other plaintiffs claimed that this restriction on the media led to "viewpoint discrimination" because the media was allowed to cover the supplies and soldiers leaving for war, but not the deceased returning thereby giving the public a false sense of security that everything associated with the war was positive. See *id.* at 238. For further discussion of viewpoint discrimination, see *infra* notes 128-33 and accompanying text.

13. For a discussion of the facts and procedural background of *JB Pictures*, see *infra* notes 18-25 and accompanying text.

14. For an analysis of prior cases dealing with the press's right of access, see *infra* notes 26-133 and accompanying text.

15. For an examination of the D.C. Circuit Court's reasoning in *JB Pictures*, see *infra* notes 134-68 and accompanying text.

16. For a critical analysis of the court's holding and rationale in *JB Pictures*, see *infra* notes 169-92 and accompanying text.

17. For a discussion of the potential consequences of this decision, see *infra* notes 193-94 and accompanying text.

for burial.¹⁸ Ceremonies, open to the public and press, took place at Dover upon the arrival of the deceased soldiers.¹⁹ The Department of Defense, however, instituted a policy prior to Desert Storm, which changed the place of the ceremonies to the service member's home or duty base.²⁰ This policy prohibited media coverage of the deceased at the port of entry but permitted coverage at interim stops and home stations with the families' consent.²¹

The Department of Defense did not restrict media access to other events at Dover thereby allowing the media to continue to cover outgoing personnel and supplies.²² JB Pictures and other plaintiffs²³ claimed that the restrictions were unconstitutional because they constituted impermissible "viewpoint discrimination."²⁴ The Department of Defense countered that the restriction was constitutional because of the governmental interests it protected.²⁵

18. See *JB Pictures*, 86 F.3d at 238.

19. See *id.* During the Panama invasion, just two years before Desert Storm, the public and press attended ceremonies at Dover for soldiers killed in the military operation. See Craig Hines, *Bush Says Casualties Regrettable but "Worth It"*, Hous. CHRON., Dec. 22, 1989, at 1 (reporting landing at Dover of C-141 Starlifter carrying bodies of four dead sailors and ceremonies that followed).

20. See U.S. DEPT. OF DEFENSE, PUBLIC AFFAIRS GUIDANCE—OPERATION DESERT STORM CASUALTY AND MORTUARY AFFAIRS 3, Joint Appendix ("J.A.") 123 (Feb. 7, 1991).

21. See *id.* During Desert Storm, bodies were still brought to Dover before being flown to a home or duty base, but the government prohibited press access whenever bodies were present. See *JB Pictures v. Department of Defense*, 21 Media L. Rep. 1564, 1565 (D. D.C. 1993).

22. See *JB Pictures*, 86 F.3d at 238. Additionally, the government did not enforce the restrictions on the media at Dover following Desert Storm for deaths unrelated to war. See *Crash Victims Returned Home 33 Flag-Draped Coffins Arrive from Croatia*, FLA. TODAY, Apr. 7, 1996, at A3 (describing ceremonies held at Dover for Commerce Secretary Ron Brown and other victims of plane crash); see also Meg Greenfield, *The Long Journey from Mass Graves to Stately Honor Guards*, WASH. POST, Apr. 15, 1996, at A21 (describing televised aspects of ceremonies at Dover for Ron Brown, Air Force personnel and others who died in plane crash in Croatia).

23. The plaintiffs include journalistic photographers and other news media, veterans groups and numerous military families. See *JB Pictures*, 21 Media L. Rep. at 1564 n.1.

24. See *JB Pictures*, 86 F.3d at 238. JB Pictures asserted that the government's restriction on the media's access to deceased soldiers, allows the public to see only the positive aspects of Operation Desert Storm. See *id.*

The Veterans for Peace (VFP), also plaintiffs in the suit, raised the argument that the restrictions deprived them of the freedom to speak because they intended to "witness" the arrival of the war dead. See *id.* at 241. The VFP is a non-profit organization comprised of over 2600 veterans formed for the purpose of abolishing wars. See *id.* It disseminates information related to the negative aspects of war and forms relations with pacifists of other nations. See *id.*

25. See *id.* The Department of Defense argued that the restriction protected the privacy interests of the bereaved families and reduced any feeling of compulsion to travel to Dover. See *id.* The Department of Defense also argued that the

III. BACKGROUND

The primary issue in *JB Pictures* was whether the First Amendment accords the public and the media a right of access to deceased soldiers at Dover Air Force Base.²⁶ The Supreme Court previously decided cases pertaining to the media's right to gather information in prisons and criminal proceedings.²⁷ In cases involving the media's right of access to prisons, the Court utilized a balancing test, weighing the public's interest in obtaining information against the government's interest in denying access.²⁸ Alternatively, when the issue was a right of access to criminal proceedings, the Court imposed a two prong test.²⁹ The Court found a qualified First Amendment right of access when: (1) there was a tradition of openness and (2) access contributed to the functioning of the process.³⁰ The Court did not clarify which test lower courts should apply in right of access cases in areas other than prisons and criminal proceedings. Lacking clear precedent, district courts and circuit courts have generally applied both tests.³¹

A second issue in *JB Pictures* was whether the media has a right to be free from governmental restrictions that preclude the report-

case was moot because it was brought after the conclusion of Operation Desert Storm. *See id.*

26. *Id.* at 236.

27. *See* George E. Seay, III, Comment, *Remote Sensing: The Media, the Military, and the National Security Establishment—A First Amendment Time Bomb*, 59 J. AIR L. & COM. 239 (1993) (categorizing right of access cases into two areas: (1) right of access to prisons and (2) right of access to courtrooms).

28. *See* *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (holding media has no right of access to jails beyond public's right of access); *Pell v. Procunier*, 417 U.S. 817 (1974) (holding no right of access for interviewing specific state inmates); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (following *Pell* and applying same holding to federal situation).

29. *See* Michael J. Hayes, Note, *What Ever Happened to "The Right to Know"?: Access to Government-Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111, 1116-21 (1987) (exploring Supreme Court precedent pertaining to public's right to know in criminal proceeding context); *see also* *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) (enunciating two prong analysis and holding right of access extends to preliminary hearings); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) (holding right of access to voir dire portion of criminal trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (holding right of access to criminal trials unless compelling government interest is shown and narrowly tailored restriction is imposed); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (holding right of access to criminal trials).

30. *See* Hayes, *supra* note 29, at 1121. The government can still restrict this qualified right of access if it shows an overriding interest and if the restriction is narrowly tailored to execute the interest. *See id.*

31. For a discussion of lower court decisions applying the balancing test, *see infra* notes 95-104 and accompanying text. For a discussion of lower court decisions applying the two prong analysis, *see infra* notes 88-94 and accompanying text.

ing of news in a content-neutral manner.³² The Supreme Court distinguishes between public forums, limited public forums and nonpublic forums and applies varying levels of scrutiny to test the constitutionality of speech regulations.³³ In both public forums and limited public forums, courts reviewing content-based regulations require a compelling interest and narrowly tailored regulations designed to effectuate the compelling interest.³⁴ Alternatively, for nonpublic forums, courts only require that content-based restrictions be reasonable.³⁵ Discrimination on the basis of viewpoint, however, is subject to strict scrutiny irrespective of the forum type.³⁶

A. The Right To Gather Information - Supreme Court Precedent

The Court first addressed the idea of a First Amendment right to gather information in *Zemel v. Rusk*.³⁷ In *Zemel*, the Court held that the First Amendment contains no unqualified right to gather

32. *JB Pictures*, 86 F.3d at 239. JB Pictures and other plaintiffs alleged that the Department of Defense's policy abridged their First Amendment right to gather, report, publish and speak about information pertaining to Operation Desert Storm. See *JB Pictures v. Department of Defense*, 21 Media L. Rep. 1564, 1565 (D.C. 1993). Both the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit limited their analysis to the media's right of access to Dover for purposes of gathering information. For a discussion of the D.C. Circuit's analysis, see *infra* notes 134-68 and accompanying text.

33. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1982). For further discussion of these categories of forums and the relevant characteristics of each, see *infra* notes 105-33 and accompanying text.

34. See *id.* See generally, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983) (discussing different standards Supreme Court applied for content-neutral and content-based regulations).

35. See *Perry*, 460 U.S. at 46; *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) [*ISKON*] (holding expressive regulations of public forum or designated public forum valid only if narrowly tailored to accomplish compelling state interest and regulations of nonpublic forums valid if reasonable). For further discussion of *Perry* and *ISKON*, see *infra* notes 105, 120-22 and accompanying text.

36. See Stone, *supra* note 34, at 197-200 (noting Supreme Court has applied stringent standard to all examples of viewpoint discrimination whether modest or not); see also *Perry*, 460 U.S. at 45-46 (recognizing applicability of strict scrutiny for viewpoint restrictions even when forum is public property not open for expression by tradition or designation).

37. 381 U.S. 1 (1965). The issue in *Zemel* was whether the Secretary of State could refuse to validate a citizen's passport. *Id.* at 16. The citizen alleged that the First Amendment protects a citizen's right to travel abroad to obtain information pertaining to the U.S. Government's foreign and domestic policies. See *id.*

information.³⁸ Several years later, the Court recognized First Amendment protection for news gathering in *Branzburg v. Hayes*.³⁹ Justice Powell, in a concurring opinion, established a balancing test that weighs the public's interest in obtaining information against the government's interest in restricting access when deciding whether a restriction on the media's access is constitutional.⁴⁰ The *Branzburg* balancing test became the Court's primary analytical tool in cases that address the media's right of access to prisons and jails.⁴¹

1. *The Media's Right of Access to Prisons and Jails*

In *Pell v. Procunier*,⁴² the Court relying on the *Branzburg* balancing test, upheld a California Department of Corrections regulation which prohibited the press and others from interviewing specific inmates.⁴³ In *Pell*, three journalists claimed that the regulation violated the First Amendment freedom of the press by limiting their

38. *Id.* at 17. The Court recognized that this holding hindered the free flow of information, but also recognized that holding to the contrary would allow citizens access to forums, such as the White House, where unrestrained information gathering is simply impermissible. *See id.*

39. 408 U.S. 665 (1972). *Branzburg* worked for a news journal and published an article that pertained to the production of marijuana and included a photograph of two pairs of hands working with the illegal substance. *See id.* at 667. *Branzburg* was subpoenaed to testify before a grand jury about the identity of the individuals in the photograph. *See id.* at 668. *Branzburg* claimed that the First Amendment contained a right to gather news and that in order to maintain this right it was necessary to keep sources confidential. *See id.* at 679-80.

40. *See id.* at 710 (Powell, J., concurring). In *Branzburg*, the Court analyzed whether a reporter could be compelled to answer a grand jury subpoena and answer questions pertaining to sources used in investigating criminal activity. *Id.* at 683. Justice Powell focused on whether a reporter's interest in not revealing confidential information outweighed the public's interest in obtaining such information at a grand jury proceeding. *See id.* at 710 (Powell, J., concurring). The Court recognized that without protecting the right to gather information, the "freedom of the press could be eviscerated." *Id.* at 681. However, Justice White, writing for the majority, also declared that the First Amendment does not protect the press from all burdens. *See id.* at 682. The press "has no special immunity from the application of general laws." *Id.* at 683 (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)). Moreover, "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* at 684 (citing *New York Times Co. v. United States*, 403 U.S. 713, 728-30 (1971); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)). Ultimately, the Court concluded that public interest in obtaining information at grand jury proceedings outweighed the press's interest in keeping information and sources confidential. *See Branzburg*, 408 U.S. at 690-91.

41. *See Seay*, *supra* note 27, at 269.

42. 417 U.S. 817 (1974).

43. *Id.* at 834-35. California Department of Corrections Manual section 415.071 prohibits press interviews with specified inmates. *See id.* at 819.

news gathering activities.⁴⁴ Procnunier, Director of the California Department of Corrections, claimed that the California Penal Code empowered him with the authority to institute such restrictions.⁴⁵ In rejecting the journalists' claim, the Court reasoned that "the Constitution [does not] impose[] upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."⁴⁶ The Court agreed with the prison administrators that the interest in preserving security in the prisons outweighed the press's right to gather information.⁴⁷

On the same day that it decided *Pell*, the Supreme Court also decided *Saxbe v. Washington Post Co.*⁴⁸ Members of the Washington Post claimed that the federal prison administration abridged the First Amendment right of news gathering when it refused to permit interviews with specific inmates.⁴⁹ Saxbe, the Attorney General,

44. *Id.* at 820-21. In addition to the journalists, four California prison inmates joined the suit as plaintiffs claiming that their First Amendment right to free speech was violated by the regulation. *See id.* at 821. The Court found no First Amendment violation because inmates have adequate methods of communication with the press aside from face-to-face interviews. *See id.* at 827-28. The Court noted the prisoners' ability to communicate with members of the media in writing and their ability to communicate with the press through family members, friends, clergy and attorneys who were permitted to visit the inmates. *See id.* at 824-25.

45. *See id.* at 819 (1974). Disciplinary problems and security threats inside the prisons resulted from the former policy of allowing the press to interview specific inmates. *See id.* at 831. Inmates who chose not to follow prison regulations were interviewed frequently and became notorious among fellow inmates. *See id.* at 831-32. Other inmates wishing to attain the same status engaged in uncooperative behavior thereby causing the correctional staff severe problems in their effort to maintain a safe and secure environment. *See id.* Following a violent episode that prison administrators felt was partially caused by allowing the press to freely interview prisoners, Procnunier instituted the restriction on media access. *See id.*

46. *Id.* at 834. In reaching its holding, the Court applied the balancing test set forth by Justice Powell in *Branzburg*. *See id.* at 833. For a discussion of that balancing test, see *supra* note 40 and accompanying text.

The Court also noted that the press actually does have a superior right over the public to access information in California prisons. *See Pell*, 817 U.S. at 830. Aside from being able to attend the public tours, the press may stop and speak with inmates whom they encounter. *See id.* The press may also enter prisons and interview inmates who are selected by corrections officials. *See id.* Further, if a member of the press is writing a story about a prison program, access to inmate participants is permitted. *See id.*

47. *See Pell v. Procnunier*, 417 U.S. 817, 830 (1974).

48. 417 U.S. 843 (1974). Both cases were argued on April 17, 1974 and subsequently decided on June 24, 1974. *See id.*; *Pell*, 417 U.S. at 817.

49. *See Saxbe*, 417 U.S. at 844-45. Both the district court and the circuit court agreed with the press's argument that the prison administration could not completely prohibit press interviews with federal inmates. *See id.* The circuit court stated that interviews may be denied only when the prison administration shows a high risk of disciplinary problems based on prior inmate conduct or special conditions at the facility. *See id.* at 846.

contended that the press had no right superior to that of the public in entering prisons.⁵⁰ The Court concluded that *Pell* and *Saxbe* were indistinguishable.⁵¹ Therefore, the Court merely reiterated its holding from *Pell*, when it upheld the federal regulation restricting the media's ability to interview specific inmates.⁵²

Just four years later, the Court again analyzed whether the media has a constitutional right of access to penitentiaries.⁵³ After reporting the suicide of a prisoner and the possibility that it was caused by conditions in the county jail, KQED, a television and radio broadcasting station, sought access to the jail to investigate and report their findings.⁵⁴ The county denied KQED's access request.⁵⁵ In response, KQED filed suit requesting an injunction of the policy that excluded KQED news personnel from the jail.⁵⁶ KQED argued that the First Amendment provides for a right to gather news and implies a right of access to "government-controlled

50. See *id.* at 846-47. Like the California policy at issue in *Pell*, the federal statute in *Saxbe* only allowed admission to people who had "personal or professional ties to the inmates." *Id.* at 847. This included family, attorneys, religious counsel and in some instances, friends. See *id.* at 846.

51. See *Saxbe*, 417 U.S. at 850. The only difference between *Pell* and *Saxbe* was the regulation. In *Pell*, the press attacked California's Department of Corrections Manual regulation section 415.071 as unconstitutional. 417 U.S. at 819. In *Saxbe*, the press attacked Policy Statement 1220.1A of the Federal Bureau of Prisons. *Saxbe*, 417 U.S. at 844. Both statutes limited the press's practice of conducting face-to-face interviews with designated inmates.

52. See *Saxbe*, 417 U.S. at 850. The Court rationalized its holding in *Saxbe* in a slightly different manner than it rationalized its holding in *Pell*. See *id.* In *Pell*, the Court stated that the First Amendment does not provide "newsmen . . . [with a] constitutional right of access to prisons or their inmates beyond that afforded the general public." *Pell*, 817 U.S. at 834. In *Saxbe*, the Court stated that it was unnecessary to weigh the press's interests against those of the prison administration because the limitation on news gathering resulted from the fact that prisons are institutions not generally open to the public. *Saxbe*, 417 U.S. at 849.

53. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). The issue in *Houchins* differed from the issue in *Pell* and *Saxbe* only in that KQED wanted to access a county jail as opposed to a state or federal prison and KQED wanted not only to be able to interview inmates, but also film, photograph and record inmates and areas of the jail. *Id.* at 3.

54. See *id.* No public access policy existed at the time the suit was filed, but shortly thereafter, Houchins, the county sheriff, announced a program making public tours available, but prohibited cameras, recorders and inmate interviews. See *id.* at 4.

55. See *id.*

56. See *id.* KQED alleged that the most effective way to inform the public of the conditions inside the jail was to allow television coverage within the facility and that by failing to allow such coverage, Houchins was abridging a First Amendment right. See *id.*

sources of information.”⁵⁷ Relying on *Pell* and *Saxbe*, the Court held that the First Amendment does not guarantee a right of access to all information in the government’s control.⁵⁸ Quoting *Pell*, the Court concluded that the media had “no constitutional right of access to prisons or their inmates beyond that afforded the general public.”⁵⁹

2. *The Media’s Right of Access to the Courtroom*

When comparing cases restricting access to prisons with cases permitting the media to attend criminal trials, the Court’s policy respecting the media’s right to gather information is slightly ambiguous. The Supreme Court first recognized the media’s right to gather news in the courtroom during a criminal proceeding in *Richmond Newspapers, Inc. v. Virginia*.⁶⁰ Richmond Newspapers’ reporters sought access to the courtroom arguing that the judge had not considered alternatives to closing the trial that could ensure a fair trial.⁶¹ The Supreme Court distinguished prison right of access cases from cases dealing with the right of access to criminal trials, finding that trials were traditionally open to the public whereas prisons were not.⁶² The Court concluded that the First Amend-

57. *Houchins*, 438 U.S. at 13. According to KQED, the implied right to government information derives from the media’s critical role of supplying the public with information which safeguards the public from governmental abuses. *See id.*

58. *See id.* at 9. The Court agreed with many of KQED’s assertions. *See id.* at 8. KQED suggested, and the Court agreed, that prisons are of significant societal importance, that prisons are funded primarily by the public, that increased information about prisons would lead to more intelligent public opinions and that media serves an important function as the “eyes and ears” of the public. *See id.* Nevertheless, the Court declined to conclude that the media’s right of access was unlimited. *See id.*

59. *Id.* at 12 (quoting *Pell*, 417 U.S. at 834). In reaching this holding, the Court relied on *Zemel v. Rusk* where the Court held “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.” *Zemel*, 381 U.S. 1, 17 (1965). For further discussion of *Zemel*, see *supra* notes 37-38 and accompanying text.

60. 448 U.S. 555 (1980). In *Richmond*, a judge closed a murder trial after defense counsel complained of the possibility that jurors might inaccurately view information published in newspapers. *Id.* at 561. During the defendant’s third trial, a mistrial was declared because a prospective juror obtained information from a newspaper article concerning the defendant’s earlier trials. *See id.* at 559. The juror then discussed the case with other prospective jurors before the retrial commenced. *See id.*

61. *See id.* at 560.

62. *See id.* at 576 n.11. The Court described the long-standing tradition of allowing the public into American courts and in earlier times, English courts. *See id.* at 572. In recognizing the significance of public access to a criminal trial, the Court noted that the press must inform the public about criminal proceedings because in a democracy, it is the people who decide the fairness of the criminal justice system. *See id.* at 574 n.9 (quoting *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting)). The Court emphasized the

ment contains a freedom to listen and a "right to 'receive information and ideas.'"⁶³ Therefore, the press's right of access to criminal trials may not be restricted arbitrarily.⁶⁴

Clarifying the test put forth in *Richmond Newspapers*, the Court in *Globe Newspaper Co. v. Superior Court*⁶⁵ declared that while no absolute right of access exists to criminal trials, only a narrowly tailored restriction supported by a compelling government interest is constitutional.⁶⁶ The *Globe* challenged a Massachusetts statute that prohibited public access to trials involving certain sexual offenses where the victim was a minor.⁶⁷ The state emphasized two interests: (1) protection of victims from trauma and humiliation and (2) the greater likelihood that victims would testify and do so truthfully.⁶⁸ The Court rejected both interests stating that the first was not compelling enough and finding the second to be empirically unsubstantiated.⁶⁹ Thus, the Court found the statute unconstitutional.⁷⁰

public's high concern for the manner in which criminal proceedings are conducted. *See id.* at 577. The Court's ultimate conclusion was that "[t]he right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press." *Id.* at 577.

63. *Id.* at 576 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)). The First Amendment not only protects the press and free expression, it also restricts the government's ability to limit the supply of information available to the public. *See id.* at 575-76 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)).

64. *See id.* at 576. The Court left room for future discretion by stating that the media's access to observe trials may not be "arbitrarily" foreclosed. *Id.*

65. 457 U.S. 596 (1982).

66. *Id.* at 606-07. Before reaching its holding on the substantive issue, the Court in *Globe* dealt with a mootness challenge. *Id.* at 602. The government contended that the case was moot because the trial that *Globe Newspaper* sought to cover ended. *See id.* at 602-03. However, the Court found that when a case is "capable of repetition, yet evading review" a controversy exists. *See id.* at 603. Because *Globe Newspaper* would likely be subjected to exclusion from trials in the future under the same statute, the Court decided that the case was "capable of repetition." *See id.* Further, the Court concluded that whenever such a case was brought, it would likely "evade review" because criminal trials are normally short. *See id.*

67. *See id.* at 598 n.1 (citing MASS. GEN. LAWS ANN., ch. 278, § 16A (West 1981)). *Globe Newspaper* sought an injunction after a Massachusetts trial judge ordered the courtroom closed in a forcible rape case involving two 16 year-old victims and one 17 year-old victim. *See id.* at 598-99.

68. *See id.* at 607. The Supreme Judicial Court of Massachusetts listed additional interests, including the unhampered administration of justice and securing fair convictions. *See id.*

69. *See id.* at 607-10. The Court found the statute unconstitutional because it was not narrowly tailored to achieve the compelling interest of protecting the victims from trauma and humiliation. *See id.* Alternatives to this blanket prohibition exist, such as allowing a trial court to use its discretion in deciding when to close a court proceeding based on the age and maturity level of the victim, intrusiveness of the crime and the desires of the victim and families involved. *See id.* at 608.

70. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982).

In reaching this conclusion, Justice Brennan, writing for the majority in *Globe*, expressed two features explaining why public access to a criminal trial exists.⁷¹ First, criminal trials were traditionally open to the public.⁷² Second, access to criminal trials contributes to the functioning of the justice system.⁷³ The Court later identified these two features as prerequisites to a finding of a right of access to a criminal proceeding.⁷⁴

Several years later, the press challenged the point in time when right of public access to criminal trials attaches.⁷⁵ Press-Enterprise argued that the press's right to attend criminal proceedings begins with the voir dire proceedings.⁷⁶ The State contended that allowing the press at voir dire proceedings would cause jurors to be less open in their responses leading to an unfair trial.⁷⁷ The Supreme Court held that public access to voir dire proceedings would not hinder the right to a fair trial or compromise the potential jurors' privacy interests.⁷⁸

In a similar suit, *Press-Enterprise Co. v. Superior Court*⁷⁹ (*Press-Enterprise II*), the Court exhibited its propensity for invalidating a policy that restricts access to an area or process traditionally open to the public.⁸⁰ The issue again related to when the public's right of

71. *Id.* at 605.

72. *See id.* Reiterating his concurrence in *Richmond*, Justice Brennan stated that open access to criminal trials is grounded in the Constitution because of "the gloss of history" and favorable experience of traditional access. *Id.*

73. *See id.* at 606. Public awareness of a trial improves the fact-finding function of the proceeding and therefore benefits all involved as well as society generally. *See id.* Furthermore, access to criminal trials creates a perception of fairness and thereby legitimizes the proceedings. *See id.*

74. *See* Press-Enter. Co. v. Superior Court, 478 U.S. 1 (1986).

75. *See* Press-Enter. Co. v. Superior Court, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*]. In *Press-Enterprise I*, the Court addressed whether the right of access to criminal trials extends to the voir dire proceedings. *Id.* at 503.

76. *See id.* Press-Enterprise also sought a complete transcript of the voir dire proceedings. *See id.* The trial judge refused this because of an "implied promise of confidentiality" that exists during voir dire examination and because of a possible privacy infringement. *Id.* at 504.

77. *See id.* at 503. The trial judge allowed access to the general voir dire, but not to special voir dire pertaining to death qualifications or other possibly problematic areas. *See id.*

78. *See id.* at 513. In reaching this conclusion, the Court alluded to the historical openness of jury selection. *See id.* at 505-08. The Court also stressed that access to voir dire leads to a fairer trial and increases public confidence in the criminal justice system. *See id.* at 508. Justice Brennan previously expressed these same two features in *Globe*. *Globe*, 457 U.S. at 605-06. In *Press-Enterprise I*, as in *Globe*, the Court did not require the presence of these two features, but merely referred to them as important factors. *See* Hayes, *supra* note 29, at 1119.

79. 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*].

80. *Id.*

access attaches during criminal proceedings.⁸¹ In finding a public right of access to preliminary hearings in California, the Supreme Court explicitly enunciated a two prong test requiring: (1) a tradition of openness of the proceeding and (2) that public access play a significant role in the functioning of the criminal proceeding.⁸² This two part analysis appears to be the last word from the Supreme Court with regard to the right of access issue.⁸³

B. The Right To Gather Information - Lower Court Precedent

To date, the Supreme Court recognized a right of access in only one area, the courtroom.⁸⁴ The Court never explicitly stated that the courtroom is the only area in which the media has a right to gather information.⁸⁵ Therefore, numerous lower courts extended a right of access to other areas.⁸⁶ Because of the ambiguity in the Supreme Court precedent pertaining to a right of access,

81. See *id.* at 3. Specifically, the issue was whether the First Amendment provides a right of access to the transcript of a preliminary hearing. See *id.*

82. See *id.* at 9. The Court specifically stated that a proceeding must pass the tests of "experience and logic" before a qualified right of access attaches. *Id.* Once the Court finds a right of public access, the government must pass the strict scrutiny test announced in *Globe* to overcome this right. See *id.*

83. See *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3d Cir. 1986) (applying two part analysis from *Press-Enterprise II*). Times Leader, the plaintiff, sought access to the Pennsylvania Department of Environmental Resources (D.E.R.). See *id.* at 1165. The drinking water in northeast Pennsylvania caused an outbreak of intestinal illness and Times Leader wanted to investigate D.E.R.'s potential culpability. See *id.* Times Leader argued that the First Amendment provided it with a "right to know." *Id.* D.E.R. countered that it could restrict public access to certain information, specifically, released documents that would cause a reduction in federal funding. See *id.* at 1166. The Third Circuit assumed that the Supreme Court's analysis of access to judicial proceedings applied to the media's request to access executive branch files. See *id.* at 1174. Therefore, the Third Circuit addressed whether a tradition of openness existed and whether the public access played a significant positive role in the functioning of the executive branch. See *id.* The Third Circuit concluded that the complaint should be dismissed because Times Leader failed to demonstrate a tradition of openness. See *id.*

84. See *supra* notes 60-83 and accompanying text. While the Court addressed a right of access to prisons, it declined to adopt this right. See *supra* notes 43-59 and accompanying text.

85. See Hayes, *supra* note 29, at 1121. Hayes suggests that the Court intended the right of access to extend to areas other than the courtroom. See *id.* In *Press-Enterprise II*, the Court did not restrict its holding to the right of access in criminal proceedings. See *id.* Hayes also argues that the two prong test logically applies to other proceedings and government information generally. See *id.* Hayes substantiates this argument by relying on Justice Stevens' dissent in *Press-Enterprise II*, which suggested that the right of access extends beyond the criminal justice system. See *id.* (citing *Press-Enterprise II*, 478 U.S. at 27-28 (Stevens, J., dissenting)).

86. For a discussion of lower court cases relating to the media's right of access, see *infra* notes 88-104 and accompanying text.

lower courts sometimes apply the two prong analysis from *Press-Enterprise II* and other times apply a balancing test.⁸⁷

1. *Application of the Two Prong Test*

Some lower courts utilized the two prong test to expand the right of access.⁸⁸ For instance, the Third Circuit found a First Amendment right of access to criminal indictments.⁸⁹ Similarly, the Ninth Circuit held that a First Amendment right of access exists for documents filed during criminal proceedings.⁹⁰ The Ninth Circuit also found a First Amendment right of access to post-conviction proceedings.⁹¹

Lower courts also applied the two prong analysis and extended the right of access to areas outside of criminal proceedings.⁹² Several circuit courts recognized a right of access to civil proceedings because of a tradition of openness and the significant role access

87. For a discussion of cases applying the two prong analysis, see *infra* notes 88-94 and accompanying text. For examples of cases applying the balancing test, see *infra* notes 95-104 and accompanying text.

88. See Hayes, *supra* note 29, at 1123.

89. See *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985). Defendants sought access to bills of particulars to discover the identity of unindicted co-conspirators. See *id.* at 1105. The government argued that releasing the names of co-conspirators would intrude on privacy rights. See *id.* at 1107. The court concluded that public access to indictments serves the same societal interest as access to bills of particulars and therefore considered public access to indictments. See *id.* at 1111. In applying the two prong test and finding a right of access to indictments, the Third Circuit noted the tradition of openness to indictments and necessity of allowing public access to indictments to ensure the fairness of the criminal process. See *id.* at 1112.

In a recent decision, the United States District Court for the District of Delaware recognized a First Amendment right of access to sealed criminal documents. See *United States v. Gonzalez*, 927 F. Supp. 768 (D. Del. 1996). This court made clear that both a common law right of access and a First Amendment right of access existed. See *id.* at 785. The court analyzed the common law right using a balancing test and applied the two prong test from *Press Enterprise II* to find a First Amendment right of access. See *id.* at 773.

90. See *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983). The district judge ordered future filings of documents to be automatically sealed. See *id.* at 1144. The court relied on *Globe's* two justifications for finding a First Amendment right of access: historical openness and access must play a significant role in the functioning of the proceeding or government. See *id.* at 1145. The court found a historical right of access to pretrial documents. See *id.* It also found that pretrial documents related to incarceration prior to trial or to allegations of government abuse were important to the functioning of the proceeding and society generally. See *id.*

91. See *CBS v. United States Dist. Court*, 765 F.2d 823 (9th Cir. 1985) (presuming public right of access to criminal proceedings and documents and finding no reason not to extend this right to post-trial documents and proceedings).

92. See Hayes, *supra* note 29, at 1124.

plays in the functioning of the proceeding.⁹³ One district court used the two prong analysis to find a right of access to fact-finding hearings.⁹⁴

2. *Application of the Balancing Test*

Some lower courts applied a balancing test identical to the test set forth by the Supreme Court in *Branzburg* to decide the right of access issue.⁹⁵ These courts balanced the public's interests in gathering specific information against the government's interests in restricting access to such information.⁹⁶ For example, the United States District Court for the Northern District of Georgia addressed whether televised media representatives possessed a First Amendment right of access to limited coverage of White House events.⁹⁷ The media argued that complete exclusion of televised media violated the First Amendment because it interfered with news coverage and the public's right to receive information.⁹⁸ The government expressed no interests served by excluding televised media.⁹⁹ The

93. See *id.* at 1123 n.109 (citing *Westmoreland v. CBS*, 752 F.2d 16 (2d Cir. 1984); *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983)).

94. See *Society of Prof'l Journalists v. Secretary of Labor*, 616 F. Supp. 569 (D. Utah 1985). Since fact-finding hearings were a relatively new procedure, there was no historic tradition of openness. See *id.* at 575. However, the court analogized such proceedings to civil trials and therefore found a tradition of openness for this type of hearing. See *id.* The court also found that access contributed to the functioning of the government generally since fact-finding hearings may involve situations that significantly impact the community. See *id.* at 576.

95. For a discussion of the *Branzburg* balancing test and Supreme Court decisions applying it, see *supra* notes 40-59 and accompanying text.

96. See *Hayes*, *supra* note 29, at 1126.

97. See *CNN v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981). CNN sought access to limited coverage events at the White House. See *id.* at 1240. The White House set up pools of media representatives allowed to attend such events. See *id.* at 1239. The Press Office announced a policy of allowing five spaces to television media representatives. See *id.* at 1240. The policy required the news media to choose who would comprise the five spots. See *id.* If a consensus could not be reached among the media representatives, televised media representatives would be excluded. See *id.* The White House Press Office excluded all televised representatives when they failed to reach a consensus. See *id.*

98. See *id.* at 1241. The Court recognized several public and media interests in establishing a right of access for televised media. First, television is the only source of news for some citizens. See *id.* at 1245. Second, visual images may enhance the impression of news events. See *id.* Third, television provides a comprehensiveness and immediacy not intrinsic to print media. See *id.*

99. See *id.* The court listed certain factors that may limit a right of access including: "confidentiality, security, orderly process, [and] spatial limitations." *Id.* at 1244. The government failed to argue any of these. See *id.* at 1245.

court decided the balancing test in favor of the media because the public possessed interests while the government expressed none.¹⁰⁰

The United States District Court for the District of Massachusetts applying the balancing test found a restriction unconstitutional that limited a broadcaster's right of access to airplane crash sites.¹⁰¹ Westinghouse Broadcasting claimed that the restriction violated the First Amendment by infringing on the press's interest in gathering news and disseminating information to the public.¹⁰² The safety board countered that limitations on access were necessary to ensure an efficient and accurate investigation.¹⁰³ The court balanced these interests and concluded that the restrictions placed on the media's right of access were unconstitutional.¹⁰⁴

C. Forum Classification and Content-Based Regulations

The Supreme Court classified public forums into three areas for purposes of analyzing First Amendment claims.¹⁰⁵ First, areas traditionally open to expressive activity, such as sidewalks, streets and parks are public forums.¹⁰⁶ Second, the Court deems areas

100. *See id.*

101. *See* Westinghouse Broad, Inc. v. National Transp. Safety Bd., 8 Media L. Rep. 1177 (D. Mass. 1982). The restriction at issue limited press access to one hour a day to a particular crash site. *See id.* at 1179.

102. *See id.* Westinghouse expressed specific interests in providing televised coverage. *See id.* at 1182. Westinghouse argued that television, unlike other media, provides the viewer with what is actually transpiring at the moment. *See id.*

103. *See id.* The safety board was concerned that the media might take pieces of the wreckage or other items from the site which would disturb the investigation. *See id.* at 1179. The court listed other interests in favor of the safety board such as "confidentiality, security, orderly process, [and] spatial limitations." *Id.* at 1181 (citing CNN v. ABC, 518 F. Supp. 1238, 1244 (N.D. Ga. 1981)).

104. *See id.* at 1184. The court relied on the balancing test as set forth by the Supreme Court in *Houchins*. *See id.* at 1182.

105. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1982). In *Perry*, a teachers union (PLEA) challenged the constitutionality of a school board's decision which restricted access to teachers' mailboxes to the union who represented the teachers. *See id.* at 39. PLEA argued that this restriction violated the First Amendment and the Equal Protection Clause because of its preferential access for the teachers' union. *See id.* at 41. The Court discussed the characteristics of traditional public forums, designated public forums and non-traditional public forums. *See id.* at 45-46. The Court concluded that the school mail box system was a designated public forum and therefore reasonable content-neutral restrictions were permissible. *See id.* at 48-49. The Court upheld the content-neutral restrictions because labor-peace within schools was a reasonable justification for the restriction. *See id.* at 52.

106. *See* Hague v. CIO, 307 U.S. 496 (1939). For further discussion of *Hague* and other cases establishing the rules related to restrictions on speech in public forums, see *infra* notes 109-13 and accompanying text. *See also* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring). Justice Kennedy suggested looking at three factors to determine whether

which the government has opened to the public for expressive activity as designated public forums, and treats them similarly to traditional public forums.¹⁰⁷ Third, public property not traditionally open for expressive activity and not designated as a forum for expressive activity receives different analysis than public forums and designated public forums.¹⁰⁸

The Supreme Court applies strict standards to regulations that restrict speech in public forums.¹⁰⁹ Content-based restrictions for public forums must serve a compelling state interest and be narrowly tailored to achieve the interest.¹¹⁰ In *Police Department of Chicago v. Mosley*, a federal postal employee challenged the constitutionality of a Chicago ordinance that prohibited picketing on a public way within 150 feet of a school.¹¹¹ The employee argued that the statute was discriminatory because it prohibited all forms of picketing except when the participants were involved in a school labor dispute.¹¹² The Court concluded that selective exclusion from a public place was not permissible.¹¹³

an area is a public forum. *See id.* The first consideration was whether the property shares objective, physical similarities with traditional public forums. *See id.* Second, Justice Kennedy suggested looking at the extent to which the government acquiesced in permitting access to the property. *See id.* Third, Justice Kennedy suggested considering whether the expressive activity would significantly interfere with the government's designated use of the property. *See id.*

107. *See* *Widmar v. Vincent*, 454 U.S. 263 (1981). For further discussion of *Widmar* and the rules pertaining to restrictions on speech in designated forums, see *infra* notes 114-19 and accompanying text.

108. *See* *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992). For further discussion of *ISKON* and the rules relating to restrictions on free speech in nonpublic forums, see *infra* notes 120-22 and accompanying text.

109. *See* *Hague v. CIO*, 307 U.S. 496 (1939). In *Hague*, the plurality noted that streets and other public places were areas traditionally used for public assembly and the communication of ideas between citizens. *Id.* at 515. The privilege to use such areas for communication "must not, in the guise of regulation, be abridged or denied." *Id.* at 516.

110. *See* *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) (requiring regulations that abridge First Amendment interest to be narrowly tailored to achieve substantial government interest); *Carey v. Brown*, 447 U.S. 455, 461 (1980) (following *Mosley*).

111. *Mosley*, 408 U.S. at 93.

112. *See id.* Mosley frequently picketed on a public sidewalk adjoining Jones Commercial High School before this ordinance was enacted. *See id.* He carried a sign stating: "Jones High School practices black discrimination. Jones High School has a black quota." *Id.* After enactment of the ordinance, Mosley filed suit claiming that the statute violated the First Amendment and by allowing a specific group to picket and not others it violated equal protection of the law. *See id.* at 94.

113. *See id.* at 95. The Court held the Chicago ordinance unconstitutional because it restricted speech on the basis of subject matter. *See id.* One line of the Court's opinion summarizes its entire rationale: "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.*

Virtually the same standards apply to designated public forums as apply to traditional public forums.¹¹⁴ While a state maintains an area as open for expressive activity, reasonable time, place and manner restrictions are constitutional, but content-based regulations that are not narrowly tailored to achieve a compelling state interest are unconstitutional.¹¹⁵ In *Widmar v. Vincent*,¹¹⁶ a student organization challenged a state university's regulation that prohibited the organization from meeting in university buildings for religious purposes.¹¹⁷ The Court concluded that this regulation was subject to the same standard of review as content-based exclusions in traditional public forums because the university opened its facilities to registered organizations, thereby creating a designated forum.¹¹⁸ The Court found the regulation unconstitutional because the university's regulation did not achieve its compelling interest.¹¹⁹

Regulations that restrict public communication in nonpublic forums receive less scrutiny than regulations pertaining to traditional public forums or designated public forums. In *International Society for Krishna Consciousness v. Lee*, the Supreme Court upheld a statute that banned distributing written material and soliciting funds at three major airports.¹²⁰ The International Society for Krishna Consciousness (ISKON) challenged the statute claiming that it violated free speech.¹²¹ Justice Rehnquist concluded that an

114. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1982). For discussion of *Perry*, see *supra* note 105.

115. See *id.*

116. 454 U.S. 263 (1981).

117. *Id.* at 265. The student religious group received permission to conduct its meetings in university buildings from 1973 to 1977. See *id.* The university's regulation deprived the student organization of its First Amendment rights related to a designated public forum. See *id.* at 267-68.

118. See *id.* at 269-70.

119. See *id.* at 270-71. The Court concluded that the university's desire to maintain strict separation of church and state was a compelling interest. See *id.* at 271. However, the Court found that allowing religious organizations to meet in the designated public forums would not violate the Establishment Clause. See *id.*

120. *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 685 (1992). The Port Authority of New York and New Jersey adopted a regulation that prohibited selling or distributing merchandise, selling or distributing printed or written material and soliciting funds at La Guardia, Kennedy and Newark airports by a person to passers-by in a repetitive manner. See *id.* at 675-76. This regulation applied only to airport terminals and not to sidewalks outside the terminals. See *id.* at 676.

121. See *id.* ISKON members perform a ritual called sankirtan which requires them to distribute religious material and solicit funds in a public place. See *id.* at 674.

airport is not a traditional public forum and held that regulations on speech in such forums must only be reasonable.¹²²

Similarly, in *Greer v. Spock*,¹²³ the Court confronted the constitutionality of regulations banning political demonstrations and distribution of political material at Fort Dix military base.¹²⁴ Spock filed suit contending that the Fort Dix regulations violated the First and Fifth Amendments of the Constitution.¹²⁵ The Supreme Court distinguished an earlier decision in which it held that if streets on a military base were open to the public, the military abandons the interest of banning the distribution of leaflets.¹²⁶ In *Greer*, the military had not abandoned any interest in regulating political speeches or dissemination of information and therefore the Court concluded that the military had the "power to preserve the property under its control for the use to which it [was] lawfully dedicated."¹²⁷

122. *See id.* at 680. The Court required that the regulation on speech be reasonable and prohibited any government restriction on speech that was based on a speaker's viewpoint. *See id.* at 679.

123. 424 U.S. 828 (1976). The plaintiffs were members of both the People's Party and Socialist Workers Party. *See id.* at 832. They sought admission to Fort Dix for the purpose of distributing political literature and speaking to soldiers about election issues. *See id.* Spock and others were ejected from Fort Dix on previous occasions when they were caught distributing political literature. *See id.* at 833.

124. *Id.* at 831. Fort Dix regulation 210-26 prohibited speeches and demonstrations of a political nature. *See id.* A separate regulation prohibited the distribution of newspapers, magazines, leaflets and other similar material. *See id.* However, the latter regulation did not prohibit the distribution of campaign literature. *See id.* To prohibit such distribution, a base commander must show some threat to the loyalty of troops or security of the base. *See id.* at 831 n.2.

125. *See id.* at 834. The district court eventually held that the military could not interfere with the dissemination of political matter or the making of political speeches in areas generally open to the public at Fort Dix and the court of appeals affirmed. *See id.*

126. *See id.* at 835. *See Flower v. United States*, 407 U.S. 197, 198 (1972) (reasoning that area attempting to be regulated by military was public street because of its unlimited openness to all forms of public transportation and private vehicles and therefore was proper place for dissemination of information). *But cf. United States v. Albertini*, 472 U.S. 675, 686 (1985) (suggesting that where military has not completely abandoned control of military base, it may restrict speech because military bases are not ordinarily public forums for First Amendment purposes).

127. *Greer*, 424 U.S. at 836 (quoting *Adderly v. Florida*, 385 U.S. 39, 47 (1966)). In *Adderly*, a group of students staging a demonstration were arrested for trespassing on jail grounds. *Adderly*, 385 U.S. at 40. The students claimed that these arrests denied them a First Amendment right of free speech and assembly. *See id.* at 41. The Court rejected the students' claim because the "Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Id.* at 48.

The Supreme Court will not tolerate discrimination on the basis of viewpoint regardless of the type of forum at issue.¹²⁸ In *Sherrill v. Knight*,¹²⁹ the D.C. Circuit recognized that the government may not arbitrarily deny a newsman access to information.¹³⁰ Sherrill, a member of the press, argued that the government's denial of a White House press pass without a stated reason violated the First Amendment.¹³¹ The court concluded that when the Secret Service denies a press pass, it must provide notice and an opportunity to rebut, followed by a written decision.¹³² The court stressed that the government violates the First Amendment when it excludes individuals on the basis of their viewpoints.¹³³

IV. NARRATIVE ANALYSIS

In *JB Pictures*, the United States Court of Appeals for the District of Columbia Circuit addressed three issues.¹³⁴ First, the court considered whether the case was moot due to the conclusion of Operation Desert Storm.¹³⁵ Second, the court analyzed the central issue of whether the media has a First Amendment right of access to Dover Air Force Base to view the caskets of deceased soldiers.¹³⁶ Third, the court looked at whether the restrictions on the public or press somehow abridged the First Amendment right of free speech.¹³⁷

128. See Stone, *supra* note 34, at 197-201. Stone writes that viewpoint discrimination is perceived as repugnant because it extracts a particular message from public expression. See *id.* at 198. It compromises public debate and a community's thinking process which violates the core principles of the First Amendment. See *id.*

129. 569 F.2d 124 (D.C. Cir. 1977).

130. *Id.* at 129-30. In *Sherrill*, the White House opened press facilities to newsmen for purposes of gathering information. *Id.*

131. See *id.* When the White House denied Sherrill's request for a press pass, it provided only that denial was for security reasons. See *id.* at 127. Sherrill requested a more specific reason for the denial and was denied any further reason. See *id.*

132. See *id.* at 128. The court declined to require detailed reasons for a press pass denial, but found that a denial of a press pass infringed enough on the First Amendment to require procedural due process. See *id.*

133. See *id.* The government may not deny a press pass on the basis of content-based criteria. See *id.*

134. *JB Pictures v. Department of Defense*, 86 F.3d 236, 238 (D.C. Cir. 1996).

135. See *id.* For the court's analysis of the mootness issue, see *infra* notes 138-41 and accompanying text.

136. See *id.* at 238-41. For a description of the court's First Amendment right of access analysis, see *infra* notes 141-63 and accompanying text.

137. See *id.* at 241. For an analysis of the court's rejection of the Veterans' for Peace claim that the military restrictions abridged the First Amendment's right of free speech, see *infra* notes 165-68 and accompanying text.

Prior to dealing with the central issue of freedom of access, the D.C. Circuit Court addressed whether the case was moot.¹³⁸ The Department of Defense argued that no true controversy existed because Operation Desert Storm ended in 1992.¹³⁹ In opposition, JB Pictures asserted that the government's policy would likely enjoin access in the future.¹⁴⁰ In finding a live case or controversy, the court concluded that the case remained live because of the government's continuing policy of prohibiting the media's access.¹⁴¹

After concluding that a live controversy existed, the D.C. Circuit Court began its analysis with the proposition that the First Amendment does not create an unrestricted right of access to government events.¹⁴² The court substantiated this proposition by analyzing prior Supreme Court decisions.¹⁴³ Next, the court applied the balancing test set forth in *Branzburg v. Hayes*.¹⁴⁴ The court compared the government's interest in restricting access with the press's desire to access an area in order to facilitate reporting.¹⁴⁵ The Department of Defense expressed two interests that the court found superior to the media's interest of disseminating information to the public.¹⁴⁶ First, the policy reduced hardship on the soldiers' families by returning the bodies to a home or duty base thereby preventing the families from feeling compelled to travel to Dover

138. See *JB Pictures*, 86 F.3d at 238. The court declared that the mootness issue may be raised at any time because it is a jurisdictional defense. See *id.* (citing *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978)).

139. See *id.* The government argued for dismissal of the case on mootness grounds even though it intended to continue to exclude the media from viewing the bodies at Dover. See *id.*

140. See *id.*

141. See *id.*

142. See *id.* According to the court, the press's right to government activities should not be unrestricted merely because unlimited access would allow more thorough reporting. See *id.*

143. See *JB Pictures*, 86 F.3d at 238-39. The D.C. Circuit cited *Zemel v. Rusk* where the Supreme Court recognized that although restrictions to the White House impede thorough reporting, no First Amendment right exists for such access. See *id.* (quoting *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)). Similarly, although the press may more thoroughly report events of a war from the battleground, it is often precluded from doing so by governmental restrictions. See *Nation Magazine v. Department of Defense*, 762 F. Supp. 1558, 1574 (S.D.N.Y. 1991) (discussing reasons such as national security and secrecy of military strategy to prohibit the press' unrestricted access to battlefield). For a discussion of press coverage in prior wars see Boydston, *supra* note 7, at 1074-88 (examining media's access to wars from American War of Independence to Persian Gulf War); Seay, *supra* note 27, at 255-63 (analyzing ongoing conflict between media and military in times of war).

144. 408 U.S. 665 (1972). For a discussion of the facts and analysis of *Branzburg*, see *supra* notes 39-41.

145. See *JB Pictures*, 86 F.3d at 239.

146. See *id.* at 240-41.

for ceremonies.¹⁴⁷ Second, the Department of Defense argued an interest in protecting the privacy of the deceased's family and friends who may not want the arrival of the deceased broadcasted.¹⁴⁸ Furthermore, the court reasoned that the policy of allowing the families to consent to media coverage was consistent with these two interests and therefore found the entire policy constitutional.¹⁴⁹

In further establishing the constitutionality of the policy, the court distinguished the line of cases that granted a right of access for the media in the courtroom.¹⁵⁰ Restrictions on access to criminal proceedings differ from restrictions on access to prisons and military bases, because, unlike prisons and military bases, criminal proceedings were traditionally open to the public.¹⁵¹ Since military bases are not places traditionally open to the press or public, the government need not show a compelling interest to restrict the press.¹⁵² The government only needs to show one or more interests that outweigh the media's interest in obtaining information.¹⁵³

147. See *id.* at 241. JB Pictures claimed that the government's concern for the families possibly having to travel great distances to attend the ceremonies at Dover could be avoided if no ceremonies were held at Dover. See *id.* The court, however, believed that families might still feel compelled to travel to Dover just to be present for the deceased's arrival in the United States. See *id.* Furthermore, the court stated that the Constitution does not force the government to make a choice between having no ceremony, thereby making the government appear insensitive, or having a ceremony, thereby burdening the bereaved which again would make the government appear insensitive. See *id.*

148. See *id.* The court explained that the privacy interest will vary with the number of dead soldiers returning at one time because the fewer the caskets, the easier it would be to surmise the identity of the soldiers. See *id.*

149. See *JB Pictures*, 86 F.3d at 241.

150. See *id.* at 239. The court cited three cases involving the media's right of access to criminal proceedings in which the Supreme Court upheld the media's interest. See *id.* The court distinguished these cases on the basis that courtrooms were traditionally open to the public and military bases were not. Compare *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) (holding press and public have right of access to voir dire examination of potential jurors); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (concluding press has right of access to criminal trials); and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (agreeing with holding in *Richmond*), with *Pell v. Procunier*, 417 U.S. 817 (1974) (holding press has no right to interview specific inmates in prisons); and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (following *Pell*). For a further discussion of these cases, see *supra* notes 75-78, 60-64, 65-70, 42-47 and 48-52 respectively and accompanying text.

151. See *JB Pictures*, 86 F.3d at 239. The media's right of access to criminal proceedings can only be restricted if the government demonstrates a compelling interest. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982). For a further discussion of *Globe*, see *supra* notes 65-70.

152. See *JB Pictures*, 86 F.3d at 239.

153. See *id.* This is essentially the balancing test utilized in *Branzburg v. Hayes*, 408 U.S. 665 (1972). For a discussion of the balancing test, see *supra* note 40 and

Next, the court addressed *JB Pictures'* claim that the Department of Defense policy was discriminatory and not viewpoint neutral.¹⁵⁴ The D.C. Circuit Court dismissed this argument by stating that all media and the public were uniformly subject to the restriction.¹⁵⁵ The court also found the "viewpoint biased" argument devoid of merit.¹⁵⁶ The court reasoned that the sight of dead soldiers returning would not necessarily bias the public's perspective of the war because the return of war dead is not "an event necessarily laden with anti-war implications."¹⁵⁷ Furthermore, the court expressed the opinion that departing supplies and soldiers was not necessarily a positive event.¹⁵⁸ Even if the restriction produced a biased perspective, the court reasoned it would not necessarily be unconstitutional since the Supreme Court previously upheld restrictive policies that produced biased portrayals of prisons.¹⁵⁹

The court flatly rejected *JB Pictures'* contention that this policy is discriminatory because Dover was at one time open for the purpose of viewing the returning war dead.¹⁶⁰ In addition, the court concluded that the government may institute new restrictions without being subjected to a claim of discriminatory practice each time it does so.¹⁶¹

accompanying text. The D.C. Circuit Court also noted that the Third Circuit held that a claim to a right of access cannot succeed unless there is a tradition of openness irrespective of the strengths of the interests put forth by the government or the media. *See id.* (citing *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1173-76 (3d Cir. 1986)).

154. *See JB Pictures*, 86 F.3d at 239. *JB Pictures* claimed that the sight of returning dead soldiers conveyed a perspective entirely different from the sights of soldiers and supplies going off to war and that by restricting the broadcast of the returning dead the public was receiving a biased perspective of the war. *See id.*

155. *See id.* The court distinguished this case from another D.C. Circuit Court decision which found a discriminatory practice in the Secret Service's procedures of denying certain journalists access to the White House without providing a reason. *See Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977).

156. *See JB Pictures*, 86 F.3d at 239.

157. *Id.* The court alluded to the Gettysburg Address and Pericles' speech during the Peloponnesian War to suggest that the event of returning dead soldiers does not always insight anti-war sentiment. *See id.*

158. *See id.*

159. *See Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (upholding restriction on media even though it meant that public might receive less than candid perspective on prison life because reporters were barred from interviewing inmates of their choosing). The *JB Pictures* court suggested that the viewpoint biased broadcasting occurs frequently in covering the political realm since politicians showcase positive events and remain "behind the scenes" during negative ones. *JB Pictures*, 86 F.3d at 240. The court also stated that virtually all restrictions would be impermissible if they were banned because of possible viewpoint discrimination. *See id.*

160. *See JB Pictures*, 86 F.3d at 240.

161. *See id.*

According to the court in *JB Pictures*, the Department of Defense's restriction places an insignificant burden on the media because reporters will receive no new information by gaining access to the returning deceased soldiers.¹⁶² The court found this policy less restrictive than the one upheld in *Pell* and *Saxbe*.¹⁶³ In *Pell* and *Saxbe* the restrictions actually inhibited the collection of some facts whereas here the policy does not suppress information concerning the number and identity of soldiers killed.¹⁶⁴

Finally, the court dealt with plaintiffs' claim that the policy unconstitutionally denied them a right to speak.¹⁶⁵ The Veterans for Peace intended to "witness and pay their respects" to the deceased at Dover.¹⁶⁶ Although the term "witness" may connote an expressive activity in some contexts, the court reasoned that what the Veterans for Peace truly desired was to see the returning caskets.¹⁶⁷ Therefore, the court decided that this claim was identical to plaintiffs' right of access claim and refused to find the policy unconstitutional on this basis.¹⁶⁸

162. *See id.* The court reminded *JB Pictures* that the policy is not a complete bar to arrival ceremonies since the media may gain access at interment cites or home bases with the family's consent. *See id.* Like other restrictive policies upheld by the Supreme Court, this policy does not completely prevent media access. *See Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974) (noting that press still enjoyed "substantial" access to prisoners even with policy in place).

163. *See JB Pictures*, 86 F.3d at 240.

164. *See id.* In *Pell* and *Saxbe* the restriction actually limited the information that reporters were able to obtain because certain inmates and areas of the prison were off limits to the media. *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). In *JB Pictures*, no impediment existed as to the information, only the images. *JB Pictures*, 86 F.3d at 240.

165. *See JB Pictures*, 86 F.3d at 241. In a memorandum opinion, the district court concluded that *JB Pictures*' free speech claim lacked merit because the Department of Defense policy does not restrict the media's right to speak at Dover. *See JB Pictures v. Department of Defense*, 21 Media L. Rep. 1564, 1566 n.6 (D. D.C. 1993). It merely restricts the media's free access to the base. *See id.*

166. *JB Pictures*, 86 F.3d at 241.

167. *See id.* The text surrounding the claim that Veterans for Peace (VFP) intended to "witness" the war dead provides more evidence that what VFP wanted to do was see rather than speak at Dover. *See id.* The VFP is described as an organization that desires to abolish all wars. *See id.* It provides the public with war related information and therefore, the court concluded that, like the media, VFP was merely concerned with "carrying a message from Dover" rather than speaking there. *See id.*

168. *See id.* The VFP was not the only plaintiff claiming that the policy abridged a freedom to speak. *See id.* However, the other claims, like the VFP's, were concerned with not being able to inform the public. *See id.* According to the court, this claim although disguised as a free speech claim is truly a right of access claim. *See id.*

V. CRITICAL ANALYSIS

Criticism exists concerning the D.C. Circuit Court's opinion in *JB Pictures*. First, the court inaccurately resolved the balancing test in favor of the government. The media's interest in *JB Pictures* was more significant than in prior right of access cases and the government's expressed interests lacked both strength and legitimacy. Second, the court improperly dismissed *JB Pictures*' viewpoint based restriction argument.

The Supreme Court's limited analysis of cases dealing with the media's right to gather information makes it difficult for lower courts to decide what test to apply when the place or process seeking to be accessed is not a courtroom or prison.¹⁶⁹ While the Supreme Court handled First Amendment issues pertaining to military bases, it never specifically addressed whether a right of access for news gathering purposes existed.¹⁷⁰ Judging by Supreme Court and lower court precedent, the D.C. Circuit properly chose to apply the balancing test utilized in *Pell*, *Saxbe*, and *Houchins* as opposed to applying the two prong analysis expressed in *Press-Enterprise II*. The Supreme Court applied the two prong analysis exclusively to criminal proceedings and lower courts merely extended its application to documents in criminal proceedings and to civil proceedings.¹⁷¹

169. See Seay, *supra* note 27, at 271-72 (noting "[t]he constitutional status of news gathering became murkier" when Supreme Court decided right of access exists to judicial proceedings). The prison right of access cases established the proposition that the First Amendment provides no guaranteed right of access to information within government control. See *id.* at 270. Right of access to judicial proceedings for news gathering purposes exists because these proceedings were traditionally open to the public. See *id.* at 272. In an attempt to predict whether the Supreme Court would allow access to remote-sensing satellite imagery, Seay notes that the two categories of right of access cases the Court dealt with are so different that making such a prediction would be pure speculation. See *id.*

170. See *Greer v. Spock*, 424 U.S. 828 (1976) (holding military base is nonpublic forum for free speech purposes); *Flower v. United States*, 407 U.S. 197 (1972) (concluding that certain roads on military base were public forums due to complete openness to public); *United States v. Albertini*, 472 U.S. 675 (1985) (holding that military bases are not ordinarily public forums). For a discussion of these cases, see *supra* notes 123-27 and accompanying text.

171. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (recognizing tradition of openness of courtroom and function of informing society of criminal justice system); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (following *Richmond* and holding only compelling justification can overcome public right of access to criminal proceedings); *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) (establishing two prong analysis formally).

Lower courts have not applied the two prong analysis to situations outside of criminal or civil proceedings. See *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985) (applying two prong analysis and finding right of access to indictments); *Associated Press v. United States Dist. Ct.*, 705 F.2d 1143 (9th Cir. 1983) (applying two prong analysis and finding right of access to pretrial documents). But see *Soci-*

Therefore, applying the two prong test to the right to gather information at military bases is inappropriate.¹⁷²

Although the D.C. Circuit applied the appropriate test, it resolved the balancing test incorrectly. In *JB Pictures*, the court analyzed the balancing test utilized in *Pell v. Procunier*¹⁷³ and *Saxbe v. Washington Post Co.*,¹⁷⁴ but it failed to distinguish between the strength of the press's interest in a right of access in prisons and the press's interest in a right of access to Dover Air Force Base.¹⁷⁵ In both cases, the press's interest is gathering and disseminating information to make the public aware of government policies.¹⁷⁶ This interest appears more compelling in a situation, like that in *JB Pictures*, in which government decisions resulted in loss of human life rather than a situation where a prison administration possibly violated criminals' rights.¹⁷⁷

The D.C. Circuit refuted the idea that access to Dover to view the war dead is substantially more important than access to prisons to speak with designated inmates by concluding that no new information will be revealed by allowing the press to view the caskets.¹⁷⁸ While it is true that no new facts will be discovered by allowing press access to Dover, media coverage at Dover would result in increased

ety of *Prof'l Journalists v. Secretary of Labor*, 616 F. Supp. 569 (D. Utah 1985) (applying two prong analysis to fact-finding hearings because of similarity to civil trials).

172. While *stare decisis* would suggest applying the balancing test, some commentators suggest that the two prong analysis is applicable to cases outside the courtroom. See Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-examination*, 18 HARV. C.R.-C.L. L. REV. 409, 440-41 (1983). Leverson researched historical public access to prisons and concluded that a tradition of openness existed and that public access served a function of enabling prisoners to petition for redress of grievances. See *id.*

173. 417 U.S. 817 (1974).

174. 417 U.S. 843 (1974).

175. *JB Pictures*, 86 F.3d at 240.

176. See *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (reasoning that primary purpose of First Amendment is to "protect the free discussion of governmental affairs.") In *Mills*, the Court expressed the opinion that the press serves the function of keeping elected officials accountable to the people. *Id.*

177. See Rahdert, *supra* note 7, at 1540. Rahdert noted the public's especially acute interest in access to information during a war. See *id.* Without access, citizens are unable to obtain accurate information and therefore cannot properly engage in the democratic process to prevent unnecessary wartime expenditures and loss of blood. See *id.* Rahdert recognized information pertaining to the success or failure of operations as extremely important. See *id.* The Department of Defense restriction in *JB Pictures*, preventing viewing of war casualties, precludes proper coverage of the American failures during Operation Desert Storm and as a result, the democratic process suffers.

178. See *JB Pictures*, 86 F.3d at 240. The number of casualties and manner of occurrence resulting from a military conflict will already be available to the press and therefore access to Dover provides no new information. See *id.*

dissemination of information.¹⁷⁹ Moreover, coverage of the ceremonies at Dover provides the public with a realistic, emotional aspect of the events that a newspaper article cannot match.¹⁸⁰

On the other side of the balancing test are the governments' interests in protecting the bereaved families' privacy interests and the interest in not making the friends and family of the deceased feel obligated to travel to Dover for the arrival ceremonies. While these interests are not insignificant, they appear trivial when compared with the government's interest expressed in *Pell* and *Saxbe* of maintaining prison security.¹⁸¹ In *Pell*, the restrictive policy functioned to reduce prison violence where correctional officers' or inmates' lives were threatened.¹⁸² In *JB Pictures*, the restriction on press coverage merely mitigated a potential inconvenience and slight intrusion on the families of the war casualties. In conclusion, the less substantial government interest and the greater media interest in *JB Pictures*, suggest that the D.C. Circuit Court should have concluded that the media's interest outweighed that of the government.

In addition, the legitimacy of the Department of Defense's interests in *JB Pictures* is somewhat suspect. First, the deceased's families protested the lack of ceremonies at Dover, which shows that the assertions of government concern over the families' privacy interests and the families' obligation to travel to Dover may have been false.¹⁸³ Second, following Desert Storm, the military held ceremonies at Dover and allowed the press access.¹⁸⁴ The privacy interests of the bereaved families and the feeling of compulsion to attend the ceremonies are no different now than during Desert Storm. The only difference appears to be that the government restricted access during a war when media coverage of deaths could sway pub-

179. See *CNN v. ABC*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (recognizing that television is only source of news for some individuals).

180. See *id.* Visual media provides a dimension not available in other forms of coverage. See *id.* Television gives an immediate, comprehensive account of events that are currently occurring. See *id.*

181. See *Pell v. Procunier*, 417 U.S. 817, 832 (1974). For a further discussion of *Pell* and this policy, see *supra* notes 42-47 and accompanying text.

182. See *id.*

183. See Patrick J. Sloyan, *The War You Won't See: Why the Bush Administration Plans to Restrict Coverage of Gulf Combat*, WASH. POST, Jan. 13, 1991, at C2 (stating that families of dead crew members protested when no ceremonies were held at Dover following the crash of a cargo jet during Desert Shield).

184. See Greenfield, *supra* note 22, at A21 (describing televised ceremony at Dover following plane crash that killed Commerce Secretary Ron Brown and 32 other Americans).

lic opinion against military involvement, but permitted access at a time when governmental decisions did not result in deaths.¹⁸⁵

Furthermore, the D.C. Circuit failed to address JB Pictures' free speech argument and therefore arbitrarily dismissed JB Pictures' contention that the Department of Defense restriction created a biased viewpoint.¹⁸⁶ The D.C. Circuit should have recognized coverage of the deceased soldiers as speech.¹⁸⁷ Restrictions on speech require an analysis of the forum type where the expressive activity occurred.¹⁸⁸ While Dover Air Force Base was probably not a traditional public forum,¹⁸⁹ it was a designated public forum because the government opened Dover for the express purpose of allowing the public and media to view supplies and personnel being shipped off to the Persian Gulf.¹⁹⁰ Therefore, if the D.C. Circuit had properly analyzed JB Pictures' claim as one pertaining to free speech it would have applied strict scrutiny to the Department of Defense restriction.¹⁹¹ While the two interests expressed by the government, protecting the deceased family's pri-

185. See Matthew J. Jacobs, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675, 724-25 (1992) (suggesting that military formulated strategy that resulted in manipulation of media coverage following Vietnam War).

186. See *JB Pictures v. Department of Defense*, 21 Media L. Rep. 1564 (D.C. 1993) (stating plaintiffs' claim as "right[] to know, to gather, report, and publish news, and to speak about the effects of the war").

187. See *CNN v. ABC*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (describing television broadcasting as unique form of speech because of live, comprehensive dimension it provides).

188. For a discussion of forum classification and content-based regulations, see *supra* notes 105-33 and accompanying text.

189. See *Hague v. CIO*, 307 U.S. 496, 515 (1939) (stating that traditional public forums include sidewalks, streets and parks). Dover would probably not constitute a traditional public forum even under Justice Kennedy's liberal analysis of traditional public forums. See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring). For a discussion of Kennedy's analysis of what constitutes a public forum, see *supra* note 106. An air force base is physically similar to other traditional public forums, since air force bases are comprised of sidewalks and streets. However, the government has not acquiesced substantially in permitting access to Dover. Furthermore, allowing significant expressive activity at Dover would likely interfere with the government's interests of training airmen and preserving national security.

190. See *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that designated public forum was formed when state university opened its facilities to student organizations). For a discussion of *Widmar*, see *supra* notes 116-19 and accompanying text.

191. See *Widmar*, 454 U.S. at 269-70 (holding content-based restrictions on speech in designated public forums are subject to strict scrutiny); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. at 45-46 (citing *Widmar*). The Department of Defense restriction in *JB Pictures* is a content-based restriction because it prevents the media from displaying an entire subject matter, the deceased soldiers. The First Amendment precludes governmental restriction of expression based on

vacy and reducing a burden on the deceased's family, were deemed sufficient to overcome a balancing test they would likely fail strict scrutiny because these interests are not compelling in light of the regulations' effect of denying the public information about the war.¹⁹²

VI. IMPACT

If the decision by the D.C. Circuit Court in *JB Pictures* stands, it may merely mean that the media will not be able to cover the return of war dead unless the consent of the families is first obtained. The government will retain the ability to protect the bereaved families' privacy interests. The media will have to find alternative ways to increase public awareness of war casualties and other negative aspects of war. Without this perspective reaching the public, the public's viewpoint will truly be one-sided resulting in a false sense of security.

The Department of Defense's restriction could be viewed as part of a continuing desire to diminish the media's ability to cover war and war related activities.¹⁹³ As the government slowly chips away at media coverage during wars, the public becomes increasingly ignorant.¹⁹⁴ Suppressing the realities of war allows the government to maintain unobstructed decision making power. Unless the courts or legislature review, and when appropriate, nullify Department of Defense restrictions on the media, the democratic nature of the United States will suffer.

its message or subject matter. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Although the D.C. Circuit failed to address content-based discrimination, it did appropriately conclude that the Department of Defense policy was not viewpoint discriminatory since all members of the media were subject to it equally. See *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977). For a discussion of viewpoint discrimination, see *supra* notes 129-33 and accompanying text.

192. See *Stone*, *supra* note 34, at 198-99. A regulation that "prevents the communication of a particular idea, viewpoint, or item of information violates the First Amendment except, perhaps, in the most extraordinary of circumstances." *Id.* at 198.

193. See John E. Smith, *From the Front Lines to the Front Page: Media Access to War in the Persian Gulf and Beyond*, 26 COLUM. J.L. & SOC. PROBS. 291 (1993) (discussing trend toward restricting media from war zone and war related events).

194. The government has recently attempted to increase restrictions on the press in areas beside military events. See Gerald M. Carbone, *ACI Wants to Limit Media Interviews the ACLU Condemns the Proposed Policy as "oppressive."*, PROVIDENCE J.-BULL., June 20, 1996, at B1 (describing state policy that requires reporters to first tell authorities purpose of their stories and to prove some benefit to law enforcement).

The Supreme Court could decide to hear this case to clarify its position on the First Amendment right of access or to apply content-based analysis to the restriction. If the Court decides to overrule *JB Pictures* the media would regain access to Dover's war dead, an area of coverage that it probably took for granted prior to the military restriction. Alternatively, the Court might decide to affirm the decision providing further light on the constitutional limits of a free press. Either way, the struggle over a right of access between the press and the government will continue.

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